UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

TROY GROVE A DIV. of RIVERSTONE GROUP INC., VERMILION QUARRY, A DIV. OF RIVERSTONE GROUP INC. Respondent, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO Union.	)	Cases 25-CA-234477 25-CA-242081 25-CA-244883 25-CA-246978

RESPONDENT'S REPLY BRIEF TO ANSWERING BRIEF OF LOCAL 150

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Pursuant to 29 CFR § 102.46, TROY GROVE QUARRY, a Division of RIVERSTONE GROUP, INC., and VERMILION QUARRY, a Division of RIVERSTONE GROUP, INC., (collectively "Respondent," "Employer," or "RiverStone"), by and through its attorneys, Califf & Harper, P.C., submits Respondent's Reply Brief to Answering Brief of Local 150.

I. INTRODUCTION

This Reply Brief will focus on the legal and factual arguments raised in the Answering Brief of Local 150 ("Union Brief") to the extent such arguments are not already comprehensively addressed in Respondent's Exceptions ("Exceptions") and Brief in Support of Exceptions ("Exceptions Brief") and are based on actual allegations in the Amended Consolidated Complaint ("Complaint") and the findings and conclusions from the decision of the Administrative Law Judge ("ALJD").[1]

II. ARGUMENT

A. Respondent did not discipline and discharge Kelly because of his protected activity in violation of Sections 8(a)(1) and 8(a)(3) of the Act. (Charge 25-CA-246978)

Under the *Wright Line* test, to prove an employer discriminated against an employee, the charging party must first establish the following: (1) the employee engaged in a protected activity, (2) the decision-maker knew it, and (3) the employer acted because of anti-union animus. *See, e.g., Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859, 874-875 (7th Cir. 2016) (citing *Wright Line*, 251 NLRB 1083 (1980)); *Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 713 (7th Cir. 2015). There must be "a causal connection between the animus and the implementation of the adverse employment action." *Contemporary Cars, Inc.*, 814 F.3d at 874-75 (citing *Huck Store Fixture Co. v. NLRB*,

[1] Citations to the record are as follows: Administrative Law Judge Decision (ALJD page:line), Transcript (Tr. page:line (Witness)); General Counsel Exhibits (GC Exh.# page, paragraph, or Bates Number); and Respondent Exhibits (R Exh.# page, paragraph, or Bates Number).

327 F.3d 528, 533 (7th Cir. 2003)). The burden then shifts to the employer "to either rebut that evidence or mount an affirmative defense that the [employer] would have taken the same action despite the employee's protected activities." *Big Ridge, Inc.*, 808 F.3d at 713-14. The Board may then conclude that the employer's explanation was a pretext because the stated reason did not exist or the employer did not actually rely on it." *Contemporary Cars*, 814 F.3d at 875 (citation omitted).

Respondent disciplined Kelly for his workplace violations in accord with Respondent's progressive discipline policy. R Exhs. 4, 6. Therefore, Respondent would have taken the same disciplinary action against Kelly for his workplace violations despite Kelly's protected activity pursuant to Respondent's progressive discipline policy. General Counsel fails to show that Respondent's "stated reason did not exist or the employer did not actually rely on it." *Contemporary Cars*, 814 F.3d at 875 (citation omitted). Respondent's basis for discharging Kelly for his attendance violations and issuing him discipline for his other workplace violations was not pretextual because the violations did in fact occur and the ALJ determined Kelly committed all the violations described in the written discipline. *See, e.g.*, ALJD 11:34-35:14; R Exh. 4 Bates# RSG CONS 001815-18; R Exh. 6; Tr. 79:16-80:6 (Scott Skerston); GC Exh. 19-22. Since Kelly admits, as he does, that he committed the conduct violative of workplace rules and described in the discipline, it clearly means the reasons did exist. *See e.g.*, ALJD 7:1-8:31, 11:34-35; R Exh. 6; GC Exh. 9-13, 17-18, 20-22, 28; Tr. 191:14-204:5, 216:24-218:3, 220:13-19 (Matt Kelly). Neither the ALJ, General Counsel, or the Union cite to a case in which an employer was found to have violated the Act by disciplining and/or discharging an employee who engaged in protected activity, but admitted to committing the workplace violations for which he was disciplined and for which other employees have been subject to discipline. Kelly was discharged for his attendance

violations even though other employees with attendance violations were not because Kelly had more attendance violations, which called for discharge under Respondent's progressive discipline policy for attendance. R Exhs. 4, 6.

The Board and courts look to several factors in determining whether anti-union animus can be inferred, including "[d]isparate treatment of certain employees compared to other employees with similar work records or offenses." *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1479 (6th Cir. 1993). Thus, the test for disparate treatment is not whether an employee was terminated or disciplined as much or more than another employee (as the ALJD appears to do) nor whether another employee received the same discipline for exactly the same behavior or the same specific details, but whether an employee was treated less favorably compared to other employees who committed similar offenses due to his protected activity. *Id.* In the instant case, the record shows other employees received discipline for similar offenses for which Kelly was disciplined and admits having committed; there were attendance violations for other employees, as well as safety violations, performance violations, and conduct violations. R Exh. 6; Tr. 268:7-279:1 (Scott Skerston). Nothing in the record indicates other employees committed violations similar to Kelly and were not disciplined according to the same guidelines applied to Kelly during the same period. R Exhs. 4, 6. The written discipline speaks for itself (R Exh. 6), and the ALJ summarized the written discipline for all other employees in her decision (ALJD 9:1-14).

B. Respondent did not deny Kelly *Weingarten* rights in violation of the Act. (Charge 25-CA-246978)

The Complaint alleges, and the ALJ erred in concluding, Respondent violated Kelly's *Weingarten* rights by refusing his request for Union representation during an interview in violation of the Act. GC Exh.1(cc) at ¶¶ 5(b), 5(d), 9; ALJD 18:18-32. The Union Brief raises no relevant new legal or factual arguments not already addressed fully in Respondent's

Exceptions Brief regarding the Weingarten allegation. As argued in Respondent's Exceptions Brief, there was no *Weingarten* violation because, as a permanent replacement worker during the ongoing Union strike, Kelly had no *Weingarten* rights. Neither the ALJ Decision, General Counsel's Answering Brief, nor the Union Brief includes citation to any caselaw finding permanent replacement workers to have *Weingarten* rights during an ongoing Union strike.

C. Respondent did not remove a Union picket sign in violation of Section 8(a)(1) of the Act. (Charge 25-CA-242081)

The Complaint alleges, and the ALJ erred in finding, Respondent through its agent, persuader Jim Misercola, interfered with the Section 7 rights of employees in violation of Section 8(a)(1) by removing Union picket signs from public property on or about January 2, 2019. ALJD 20:25-26, 20:34-35; GC Exh. 1(cc) ¶¶ 5(a), 9. Misercola clearly and consistently denied he removed any picket sign. Tr. 312:1-4, 315:9-14 (Jim Misercola).

First, it is important to recognize that the premise of the ALJ's credibility determinations regarding the sign theft charge (and the Kelly charge) is her incorrect conclusion that Respondent's hiring of a persuader, Jim Misercola, is proof of animus. ALJD 16:23-25, 14:39-40, 12:1-26. This incorrect belief by the ALJ erroneously leads her to the conclusion that the "proof" of animus (persuader Jim Misercola) is not credible and is a thief. Had the ALJ started her analysis by correctly acknowledging that the Respondent has the right to employ a persuader, Jim Misercola, due to the Respondent's free speech rights under Section 8(c) of the Act, her analysis would have been different, and her conclusion would have been correct. 29 USC § 158(c); *see also, e.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Unfortunately, that is not the case.

Second, Misercola, Respondent's persuader, unequivocally denied having removed any sign on direct by Respondent, and it was Charging Party counsel's question that was equivocal, not Misercola's answer to it:

Tr. 312 [On Direct by Respondent counsel Arthur Eggers]
1 Q Did you remove a picket sign from Troy Grove Quarry
2 or Vermillion Quarry or public property?
3 A No.

Tr. 315 [On Cross-Examination by Union counsel Steven Davidson]
9 Q You were asked about taking a picket sign either at
10 Troy Grove, Vermillion or in a public right of way
11 throughout the -- there was no timeframe. You never
12 recall taking a picket sign from Troy Grove, Vermillion
13 Quarry or a right of way, never?
14 A That's correct, sir, never.

Tr. 312:1-3, 315:9-14 (James Misercola).

Third, General Counsel and the Union's witnesses admitted at the hearing they knew Misercola was a persuader hired by Respondent, they did not like him because of his role (the police report entered as General Counsel Exhibit 24 further state their animosity for Misercola in that they regard him as a "Union buster"), they were sitting in or standing immediately outside a truck 80 yards away when the alleged act took place, and they did not actually see him remove a sign. ALJD 10:40-11:5; Tr. 97:7-23, 100:19-25, 101:1-14, 102:7-25 (Thomas Brown); Tr. 116:5-125:8 (Shane Bice); Union Brief 39-41. They were highly motivated to get the "Union buster" in trouble.

D. Respondent did not require Ellena to sign a preferential hiring list to be considered for reinstatement in violation of Sections 8(a)(1) and 8(a)(3) of the Act. (Charge 25-CA-244883)

The Complaint alleges, and the ALJ is wrong in finding, Respondent "required employee Joe Elena [sic] to sign a preferential hire list located at Respondent's Vermillion [sic] facility." GC Ex. 1(cc) at ¶¶ 6(c), 6(k), 10; ALJD 13:37-41, 14:13-19.; GC Exhs. 6(a), 6(b). The ALJ, General Counsel, and Union are reading nonexistent language into a letter from Respondent to Ellena regarding his unconditional offer to return to work. Ellena was only told that he could sign the list if he "wished to do so." The preferential hiring list was created to establish order of recall

when more than one employee offers to return and there are no vacancies. The ALJ, General Counsel, and Union cite to no case in which an employer was found to have committed an unfair labor practice by having strikers offering to return to work sign a preferential hiring list unless that employer also had vacancies and failed to reinstate strikers who had offered to return to work. Respondent had no positions it was attempting to fill when Ellena offered to return to work and has subsequently had no vacancies. GC Exhs. 5, 6(a). Specifically, the letter from Scott Skerston, Superintendent at Respondent, reads:

> Dear Joe:
>
> I received the email from Steve Russo that had attached to it your letter stating your unconditional and immediate offer to return to work immediately.
>
> There are no job openings at this time. The Company has established a preferential hiring list which you are welcome to sign if you wish to do so. The preferential hiring list is located at Vermilion.
>
> If you have any questions, please call me at (815) 481-7445.
>
> I am also sending a copy of this letter to Steve Russo by email (SRusso@local150.org) and request that he also contact you to tell the information contained in this letter.
>
> Sincerely,
>
> Scott Skerston
> Superintendent

GC Exh. 6(a). The letter did not state that Ellena must sign the preferential hiring list in order to be reinstated. *Id.* The Union Brief alleges "No one from Riverstone told him [Ellena] he was not required to sign the list." Union Brief at 43. There is no need for Respondent to inform Ellena of the absence of a requirement Respondent did not create. Respondent has not interfered with Ellena's rights as a former striker upon his unconditional offer to return to work because Ellena was not required to sign the preferential hiring list in order to be brought back to work at Respondent.

The Union alleges an unfair labor practice that is not included in the Complaint or the decision of the ALJ, namely that Respondent committed a ULP by not reinstating Ellena. Union Brief at 44; GC Exh. 1(cc). Respondent cannot be found to have committed a ULP that is not included in the Complaint. The Complaint alleges Ellena was required to sign a preferential hiring list. GC Exh. 1(cc) at 6(c), 6(k), 10. Furthermore, in support of its allegation, the Union falsely alleges Respondent "continued to hire additional replacement workers after Ellena gave his unconditional offer to return." Union Brief at 44. This is not true. There have been no subsequent vacancies, hires, or reinstatements at Troy Grove or Vermilion, and neither the Union nor General Counsel entered evidence in the record to support this allegation, which again is not part of the Complaint.

Board precedent cited by the Union is distinguishable from the instant case in that they all involve employers who explicitly created prerequisites for reinstatement of striking employees offering to return to work in what the Board found were attempts to limit their preferential hiring rights. Union Brief at 44-45. Here, unlike the facts from caselaw cited by Union, Respondent denied Ellena's reinstatement because there were no vacancies, not because Ellena did not sign the preferential hiring list. GC Ex. 6(a). Furthermore, Respondent's letter contained no explicit or implicit requirement that Ellena sign the preferential hiring list to be considered for reinstatement. *Id.* Employer did not add Ellena's physical name to the preferential hiring list because Respondent already had documentation of Ellena's offer to return to work, including date and time of his offer to return, and no one else had offered to return when there was no vacancy. A "list" of one name where the employee's offer to return was already documented is not necessary to determine order of recall. The one employee will necessarily be recalled to the first vacancy.

E. Respondent did not make a unilateral change to the punch-in policy in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (25-CA-234477)

The Complaint alleges, and the ALJ erred in concluding, Respondent violated the Act by making a unilateral change in January 2019 "to require that employees punch in no more than five minutes before the start of their scheduled shifts" without giving the Union prior notice or an opportunity to bargain. GC Exh. 1(cc) ¶ 8; ALJD 12:30-13:33.

Respondent did not unilaterally change terms and conditions of employment when it posted the five-minute punch-in notice in January 2019 because it was not a change. At the time of the alleged violation of the Act in January 2019 and for more than six months prior, the work schedule set by Respondent for the bargaining unit employees was 6:00 a.m. to 4:00 p.m., Monday through Thursday. Tr. at 135:16-25, 136:17-20 (Brad Lower). At the hearing, witnesses from the bargaining unit admitted to discussing in December 2018 or January 2019 that some employees were clocking in early and that Lower resolved to depart from their authorized schedule to punch in early, which he did. Tr. 137:5 – 139:7 (Brad Lower); Tr. 146:15-147:8 (Lyle Calkins); Tr. 154:23-156:3 (Scott Currie); Tr. 164:1-11 (Joseph Ellena). Superintendent Skerston reviewed employee timecards, confirming the employees' unilateral change (frequent and significant early punch-ins). R Exh. 8 Bates # RSG CONS 00667-68; Tr. 237:17 – 242:6 (Scott Skerston). Skerston issued no discipline, but he did post the five-minute punch-in notice next to the time clock. GC Exh. 27; Tr. 242:3-6 (Scott Skerston). Respondent did not create a new policy, but rather was enforcing the existing work schedule, consistent with its past practice, in response to employees departing from the status quo.

Employee and Union steward Lyle Calkins described the discussion with Lower and others as follows, further testifying Calkins' practice was to punch in "normally," but once or twice a week he punched in "early":

Tr. 146
15 THE WITNESS: Okay, we had all got together, like
16 we normally do, talking. The conversation, David filled
17 us in on what was going on, and Brad had brought up that
18 everybody was still punching in as soon as they get
19 there, so he was going to do the same thing.
20 Q BY MR. WILLIAMS: And did you ever have the
21 occasion to punch in early?
22 A Yes, but not very often. I would get to work and I
23 would punch in normally -- I am not the get-to-work
24 early kind of guy. I get there before my time.
25 Q How early would you get there and punch in?

Tr. 147
1 A Ten till, quarter till at the earliest.
2 Q Okay.
3 A At the earliest.
4 Q And how often did you do that?
5 A Not very often; once or twice a week.
6 Q Starting when?
7 A Since I have been in Troy Grove, or I mean, since I
8 have been at RiverStone.

Tr. 146:15-147:8 (Lyle Calkins).

Employees gathering to engage in the discussion about early punch-ins indicates that the early punch-ins in December 2018 were an aberration, not an accepted practice employees knew to be permitted. As Calkins described it, Calkins punched in "normally," not early. Tr. 146:15-147:8 (Lyle Calkins). As Lower described it, Lower decided to punch in "early" to see if he could get paid overtime. Tr. 138:17-18 (Brad Lower).

Even if the five-minute punch-in notice is found to have been a unilateral change by Respondent, which it was not, it cannot be considered a material, substantial, and significant change regarding a mandatory subject of bargaining. *See, e.g.*, *MV Transp., Inc.*, 368 NLRB No. 66, slip op. at 3 (Sept. 10, 2019) (citations omitted). Respondent sets the work schedule for employees, including whether to schedule or authorize overtime. Employees punching in more than five minutes before their scheduled start time build unscheduled, unauthorized overtime.

Compliance with the five-minute punch-in does not deprive employees of any benefit for which they are entitled, and Superintendent Skerston imposed no discipline on employees for the unscheduled, unauthorized overtime that occurred prior to the five-minute punch-in notice. Skerston's only purpose was to stop the employees' unilateral change in their start time.

III. CONCLUSION

Based on the foregoing, Respondent's Exceptions to the Administrative Law Judge's Decision, and Respondent's Brief in Support of Respondent's Exceptions to the Administrative Law Judge's Decision, Respondent respectfully requests that the Board sustain Respondent's Exceptions to the Administrative Law Judge's Decision, vacate the Administrative Law Judge's Decision and findings, and dismiss the General Counsel's Amended Consolidated Complaint in its entirety.

Date: March 8, 2021

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 8, 2021, the foregoing RESPONDENT'S REPLY BRIEF TO ANSWERING BRIEF OF LOCAL 150 was electronically filed with the National Labor Relations Board and served upon the following:

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